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ELECTION COMMISSION, INDIA

NOTIFICATION

New Delhi, the 17th July 1958

S.O. 1451.—In pursuance of the provisions of sub-rule (3) of rule 140 of the Representation of the People (Conduct of Elections and Election Petitions) Rules, 1956, and in continuation of its notification No. 82/278/57/4134, dated the 11th October, 1957, published in the Gazette of India Extraordinary, Part II—Section 3, dated the 16th October, 1957/Asvina 24, 1879, the Election Commission hereby publishes the Judgment of the High Court at Calcutta delivered on the 28th May, 1958, on the appeal filed by Shri Kamal Basu of 13/1A, Baloram Ghosh Street, Calcutta-4, against the order dated the 3rd August, 1957, of the Election Tribunal, Alipore, Calcutta in Election Petition No. 278 of 1957.

IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

The 28th May, 1958

PRESENT

The Hon'ble Paresh Nath Mookerjee
and
The Hon'ble Panchkari Sarkar,
} Two of the Judges of this Court.

APPEAL FROM ORIGINAL DECREE NO. 143 OF 1957

(ELECTION APPEAL)

Appeal against the decree of Sri Bijoyesh Mukherjee, Additional District Judge of Zillah 24 Parganas Constituting the Sessions Election Tribunal, at Alipore, in Election Petition No. 278 of 1957, dated the 3rd of August, 1957.

Kamal Basu—*Appellant (Petitioner).*

Versus

Purnendu Sekhar Naskar, one of the Respondent who appeared and others—*Respondents.*

For Appellant:

Mr. S. K. Acharyya, Counsel,
Mr. Hemanta Krishna Mitra,
Mr. Bhabani Sankar Bagchi,
Mr. Kamalesh Banerjee, and
Mr. Manash Nath Roy.

For Respondents:

Mr. Sudhir Kumar Acharyya, and

Miss Aparna Bhattacharjee.

P. N. Mookerjee, J.

This is an election appeal at the instance of an unsuccessful candidate whose attempt to get the election of one of the successful candidates declared void and set aside and to get himself elected in his place failed before the Election Tribunal. In this Court too, the appellant can have no better luck and his appeal must fail, particularly in view of the recent decision of the Supreme Court in the case of K. Kamaraja Nadar *v.* Kunja Thevar and others (unreported). That decision stares the appellant in the face and its authority concludes his present appeal.

With his characteristic fairness Mr. Acharyya, Counsel for the appellant, conceded the above position before us, but he prayed for a Certificate to enable him to take up the matter to the Supreme Court and to take his chance there to re-open the matter and persuade their Lordships to grant relief to his client on certain considerations which, according to him, were not noticed in the earlier authority. Even that prayer, however, is not entertainable by this Bench and it is bound to fail on that ground.

The disputed election concerns the double-member Diamond Harbour Parliamentary Constituency. One seat was reserved for the Scheduled Castes and the other was a general seat. At the last General Election, held in March, 1957, the appellant was a candidate from the said Constituency for the House of People. So were the respondents. There was another candidate Sushil Kumar Sardar whose name appeared in the list of contesting candidates prepared on February 4, 1957 and duly published under section 38 of the Representation of the People Act, 1951, but who retired from contest on the 13th following by giving appropriate notice under section 55A(2) of the Act. Of the said five candidates, respondents Nos. 1 and 2 and Sushil Kumar Sardar belonged to the Scheduled Caste. Respondents Nos. 1 and 2 were eventually declared elected to the general and the reserved seat respectively with 2,45,266 votes and 2,47,785 votes as against the appellant's 2,44,763 votes and respondent No. 3's 2,36,192 votes, the other candidate Sushil Kumar Sardar having retired from the contest before the poll, as stated above.

Under the Act and in pursuance thereof (*vide* section 30), January 29, 1957, was the last date fixed for nomination and February 1, 1957, was the last date of scrutiny and the 4th of February, 1957, was the last date of withdrawal. On the 4th, after the time for withdrawal had expired, the list of contesting candidates was prepared and duly published under section 38 of the Act, containing, *inter alia*, against Serial No. 3, the name of Sushil Kumar Sardar who retired thereafter from the contest, namely, on the 13th. The polling started on March 4, 1957, and it continued on the 7th, 10th and 14th. The votes were counted on the 24th, 25th and 26th, when the results were announced, declaring respondents Nos. 1 and 2 duly elected as aforesaid.

On or about April 25, 1957, the appellant filed his present petition praying, *inter alia*, that the election of respondent No. 1 be set aside and declared void and he, the appellant, be declared to have been duly elected, and alternatively, that the election of respondent No. 1 be declared void and recount be ordered and he (the appellant) be declared elected. The petition was made on various grounds which it is not necessary to state for purposes of this appeal. In the petition Sushil Kumar Sardar was not impleaded and the Election Commission which received the petition by registered post on April 25, 1958, made a note of this fact and left it to be determined by the Election Tribunal as to the effect of that non-joinder. Sri Bijoyesh Mukherjee, Additional District Judge, Alipore, was appointed the one-man Tribunal to try the appellant's petition which was sent to him on June 24, 1957, for trial. On July 13, 1957 respondent No. 1 appeared before the Tribunal and, on the 19th following, a preliminary issue was raised in the following terms:—

> "Is the instant election petition liable to be dismissed by this Tribunal under sub-section (3) of section 90 of the Representation of the People Act, 1951, on the ground that it does not comply with the provisions of section 82 of the Act?"

This issue was obviously grounded on the fact of non-joinder of Sushil Kumar Sardar. The parties were heard by the Tribunal on the preliminary issue on July 27, 1957, and by its order, dated August 3, 1957, that issue was decided against the appellant and his petition was dismissed in limine as a consequence. The appellant then presented this appeal to this court on August 23, 1957, and, after due filing of the paper books, it was listed as 'To be mentioned' on December 20, 1957, when its hearing was adjourned *sine die* (with liberty to mention) on the prayers of the learned Advocates of both sides because of the pendency of a similar matter in the Supreme Court, in which eventually the above decision (K. Kamaraja Nadar *v.* Kunja Thevar and others) was given on April 22, 1958. This appeal was then heard on May 23, 1958, and it was kept part-heard to enable the appellant's learned Counsel to cite some authority in support of his prayer for a Certificate from this Bench that this case was a fit one for appeal to the Supreme Court either under Art. 132 or Art. 133(1)(c) of the Constitution and, thereafter, on Counsel's prayer, judgment was deferred till to-day.

The point involved in this appeal is, indeed, a short one and it arises in this way. Under section 82(a) of the Representation of the People Act, 1951, an unsuccessful candidate, seeking to set aside the election of a successful candidate, with a further prayer that he, the petitioner, be declared elected, has to implead, amongst others, all the contesting candidates other than himself. The question is, who is a contesting candidate within the meaning of the section, or, to put it more directly, whether a person, whose name appeared in the list, prepared and published under section 38, as a contesting candidate but who duly retired thereafter under section 55A(2), would be a contesting candidate for purposes of section 82(a). In the case cited, the Supreme Court has answered the question in the affirmative but learned Counsel argued that it was not clear from the judgment that one particular aspect of the matter, which arises in this case and to which we shall presently refer in some detail, was present before their Lordships and whether the decision was given in spite thereof. That is how he sought to distinguish the Supreme Court decision, but, as we pointed out to him in course of argument, the distinction would not be very material. The substance of the Supreme Court's decision is that 'contesting candidate' in section 82(a) has the same meaning as in section 38 (which latter section, according to the Supreme Court, gives 'the meaning of that term as used in the Act') and that section 55A(5) furnishes the answer to the question posed, namely, as to the said meaning, and that that answer is confirmed by section 82(a) itself. To explain ourselves, we need refer only to one or two extracts from the Supreme Court decision which may be set out hereunder as follows:—

> ".....Provision is made in section 55A(5) that any person who has given a notice of retirement under section 55A(2) is deemed not to be a contesting candidate for the purposes of section 52. This is a deeming provision and creates a legal fiction. The effect of such a legal fiction, however, is that a position which otherwise would not obtain is deemed to obtain under those circumstances. Unless a contesting candidate (under section 38 of the Act) who had thus retired from the contest continued to be a contesting candidate for the purposes of election.....
> it would not have been found necessary to enact section 55A(5) ..... This provision, therefore, warrants the conclusion that a contesting candidate whose name was included in the list under section 38 but who retires from the contest under section 55A(2) continued to be a contesting candidate for the purposes of the Act, though by reason of such retirement it would be unnecessary for the constituency to cast its votes in his favour at the poll. Such a candidate for the purposes of the Act, notwithstanding his retirement from the contest under section 55A(2)....."
> .....An election petition calling in question any election can be presented by any candidate at such election or any elector on one or more of the ground specified in sections 100(1) and 101 to the Election Commission and a petitioner in addition to calling in question the election of the returned candidate or candidates may further claim a declaration that he himself or any other candidate has been duly elected. Where the petitioner claims such further declaration, he must join as respondents to his petition all the contesting candidates other than the petitioner and also any other candidate against whom allegations of any corrupt practices are made in the petition. The words "other than the petitioner" are meant to exclude the petitioner when he happens to be one of the

contesting candidates who has been defeated at the polls and would not apply where the petition is filed for instance by an elector. An elector filing such a petition would have to join all the contesting candidates whose names were included in the list of contesting candidates prepared and published by the returning officer in the manner prescribed under section 38, that is to say candidates who were included in the list of validly nominated candidates and who had not withdrawn their candidatures within the period prescribed. Such contesting candidates will have to be joined as respondents to such petition irrespective of the fact that one or more of them had retired from the contest under section 55-A(2).....".

Clearly then, the Supreme Court has held that the contesting candidates, as mentioned in the list prepared and published under section 38, would continue to be so for purposes of section 82(a), and that retirement under section 55-A(2) would not affect the position, though, of course, on such retirement a candidate would cease to be a contesting candidate for purposes of sec. 52 by reason of the express provision of section 55-A(5) in that behalf. This view follows by necessary implication from section 55-A(5) and it avoids the anomaly which might otherwise have arisen in the matter of joinder of parties when the petition was filed by an elector and when it was filed by an unsuccessful or defeated candidate, there being no apparent or justifiable reason for any distinction in the matter between the two cases.

While on the above, it is pertinent to note one other observation of the Supreme Court in the case cited. That observation runs as follows:—

> "If a candidate retires from the contest (under section 55A), he decides not to go to the poll and provision is made in the rules for the correction of the list of contesting candidates so that no elector shall in the absence of necessary information waste his vote upon him. A copy of such notice (notice of retirements) is to be affixed by the returning officer to his notice board and in the polling station and each of the remaining contesting candidates or his agent is to be supplied with such copy and the notice has also got to be published in the Official Gazette."

The Supreme Court was obviously referring here to Rules 16(2) and 20(1)(b) but, in spite of the said provisions, they held that the term, 'contesting candidate' had the same meaning in section 82(a) as in section 38. This was plainly because the clear implication of section 55A(5) which appeared to be a settlor on the point. Whatever effect the above rules may have, and the Supreme Court has indicated their purpose in the passage, quoted, they cannot effect that implication and cannot alter the meaning of the term 'contesting candidate', arising from such implication. The over-riding nature of that implication is inherent in the statutory language itself and the Supreme Court has recognised it and, if we may say so with respect, given it its due effect.

It is true,as urged by the learned Counsel, that in the copy list (Form No. 7A), sent to the appellant under rule 11 on February 20, 1957, a strip of blank paper was pasted over the entry containing the name of the retired candidate Sushil Kumar Sardar but his serial number (No. 3) was left untouched and it was retained, showing the number of candidate as before, that is, as in the original list prepared and published under section 38. This was done obviously under executive instructions [*vide* Handbook for Returning Officers 1957, published by the Election Commission, Chapter IV, p. 23, paragraph 35(d)]. But that, in our view is no ground for putting a different interpretation on the term 'contesting candidate' in section 82(a). The term has been interpreted by the Supreme Court,—and if we may add with respect, in perfect accord with the scheme and purpose and the provisions of the Act, as bearing the same meaning as in section 38, and no executive instruction or anything done under it or by the executive authority as in charge of the election can have any bearing on it so as to effect or alter that interpretation. The over-riding implication of section 55A(5), to which reference has been made above and on which the Supreme Court specifically relied, would not countenance any other interpretation and the executive instruction must bow down to it and must reconcile itself with that interpretation. At the most, the appellant might complain that he was misled by the executive action and, if law provides for any relief in these election cases under such circumstances, he may be entitled to that relief. We do not, however, find anything in the present Election Law to entitle the Court or the Tribunal to help the appellant in this matter and that is very fairly and

frankly conceded by the learned Counsel Mr. Acharyya. The executive instructions, again are of the Election Commission, conducting the elections throughout the entire dominion and they apply and are meant to apply to all such elections, and so, having regard to the well known presumption of law [*vide* section 114, illustration (e) of the Indian Evidence Act which Act applies to proceedings before the Tribunal by virtue of section 90(2) of the Representation of the People Act, 1951] that in the absence of evidence to the contrary, official Acts must be deemed to have been regularly performed, it is fair to presume that this feature was also present in the case before the Supreme Court, and the fact that no notice was taken of it and no reference was made to it by their Lordships possibly due to this that it was not considered to be a relevant matter for deciding the question of the effect of non-joinder of parties under section 82(a). We do not think, therefore, that the Supreme Court case cited above, can be validly distinguished from the present case and if that decision applies, this appeal must fail *ex-concessis*. The appeal, therefore, is dismissed, though, in the circumstances, we would make no order for costs in this Court

In view of the order, passed in the appeal, no order is necessary on the alternative application.

We would now say a few words on Counsel Mr. Acharyya's prayer for a certificate. Had it been a case under Art. 132 we would possibly have been entitled to entertain the said prayer and consider it on the merits. Admittedly, however, that Article cannot apply as there is no question here of interpretation of the Constitution and so Mr. Acharyya did not eventually press his prayer under that Article. He, however, asked for a Certificate,—we would not say 'leave to appeal' in view of a recent pronouncement of the Supreme Court,—under Art. 133(1)(c) of the Constitution. But that prayer, according to the Rules and practice of this Court, should be made before the Bench, taking up Supreme Court matters, and we have no power to entertain it. We would, accordingly, refuse the learned Counsel's prayer simply on that ground and refer him to that Bench or to any other Bench which he may consider appropriate for the purpose to renew his prayer for a Certificate in accordance with law and we would say nothting more on that subject.

Let a copy of this judgment be sent to the Election Commission, New Delhi, as early as possible.

SARKAR, J.

I agree.

[No. 82/278/57/12757.]

By order,

A. N. SEN, Under Secy.

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